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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT GARCIA,

Defendant and Appellant.

B201998

(Los Angeles County
Super. Ct. No. KA076653)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Daniel Buckley, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert Garcia appeals from a judgment entered after a jury convicted him of second degree robbery (Pen. Code, § 211).¹ The trial court found true two prior strike allegations within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), and a prior serious felony allegation pursuant to section 667, subdivision (a)(1). Defendant was sentenced to 30 years to life in state prison as follows: 25 years to life pursuant to sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (d); plus five years pursuant to section 667, subdivision (a)(1). We affirm.

CONTENTIONS

Defendant contends that: (1) the trial court violated his federal constitutional rights to jury trial and due process when it sentenced him to 30 years to life in part based on a prior juvenile matter; and (2) the trial court abused its discretion when it denied his request to dismiss a strike prior conviction.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of October 5, 2006, defendant and his brother robbed Orlando Ortega (Ortega) as he was walking home. Defendant approached Ortega, placed a hard object against his back and said “Give me your shit before I shoot you.” Ortega was frightened and believed that defendant was holding a gun to his back. Defendant’s brother searched Ortega and took his wallet and keys. Defendant and his brother then ran off. Ortega kept the robbers in his view as he jogged down the street. Eventually he saw two police officers who he flagged down. Ortega pointed out the two men who had robbed him to the police. The officers detained defendant and his brother and recovered Ortega’s wallet and keys from defendant’s brother and a plastic shopping bag containing a plastic toy gun from defendant.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

I. The trial court properly used defendant's prior juvenile adjudication as a strike for purposes of sentencing

Defendant contends that the trial court violated his constitutional rights to jury trial and due process when it sentenced him to 30 years to life in part based on a prior juvenile matter.² He urges that under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), his prior juvenile adjudication cannot constitutionally be treated as a prior conviction for purposes of the Three Strikes law, because he did not have a right to a jury trial in the juvenile court. Appellant acknowledges that California courts have rejected his argument.

The court in *People v. Fowler* (1999) 72 Cal.App.4th 581 (*Fowler*), in rejecting a similar argument noted that the Constitution does not require that juveniles be treated identically to adults and that “juveniles enjoy no state or federal due process or equal protection right to a jury trial in delinquency proceedings. [Citations.]” (*Id.* at p. 585.) The court went on to note that a “trial court may consider a defendant’s juvenile adjudications as evidence of past criminal conduct for the purpose of increasing an adult defendant’s sentence. [Citation.]” (*Ibid.*) Though *Fowler* was decided prior to *Apprendi*, the court in *People v. Bowden* (2002) 102 Cal.App.4th 387 found that *Apprendi* and the federal case of *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 (*Tighe*) were without application in a situation such as exists here, because in both of those cases the defendant’s sentence was increased after a factual finding made by the sentencing judge which is entirely different from proof of a strike prior conviction. “Under the Three Strikes law a qualifying prior conviction must, *in the current case*, be pleaded and proved [citation], beyond a reasonable doubt [citations], and the defendant has a statutory right to a jury trial, at least on the issue whether the defendant suffered the

² The trial court found true that appellant suffered a juvenile prior conviction for robbery in 1997.

prior conviction [citations]. Because the context is so different, *Appendi* and *Tighe* do not apply here.” (*People v. Bowden, supra*, at p. 393.)

We agree with the line of cases holding that a prior juvenile adjudication may constitutionally be used as a strike despite the fact that there is no right to jury trial in juvenile proceedings. (*People v. Bowden, supra*, 102 Cal.App.4th at pp. 389-390; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 834; *People v. Buchanan* (2006) 143 Cal.App.4th 139, 149.)

We conclude that the trial court properly used defendant’s prior juvenile adjudication as a strike for purposes of sentencing.

II. The trial court did not abuse its discretion in refusing to strike one or more of defendant’s prior strike convictions

Defendant urges that the trial court abused its discretion in denying his motion to strike his prior strikes “[g]iven the nature of the strike prior, the facts of the current offense, [defendant’s] grim childhood and relationship with his mother and stepfather, and the length of the sentence the trial court could have imposed if it had dismissed a strike prior.” We disagree.

Section 1385 authorizes the trial court to strike prior convictions in “furtherance of justice.” The term “‘furtherance of justice,’ requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]” (*People v. Superior Court (Romero)* 13 Cal.4th 497, 530.) The courts must recognize society’s legitimate interest in the fair prosecution of crimes properly alleged by refraining from arbitrarily cutting those rights without a showing of detriment. (*Id.* at p. 531.) A trial court abuses its discretion if it strikes a prior conviction allegation simply because a defendant pleads guilty; or because it may have a personal antipathy for the harsh sentencing result that the Three Strikes law would have on the defendant while ignoring the defendant’s background, the nature of his present offense, and other individualized considerations. (*Ibid.*)

Defendant makes a compelling argument for the striking of the prior on the basis that he had a difficult childhood; his crimes were not escalating in terms of violence; the juvenile strike prior was 10 years old; he lacked previous state prison experience; he had a methamphetamine addiction; his domestic violence convictions were misdemeanors; the instant crime lacked sophistication; and imposition of a second strike sentence would have resulted in a sufficiently punitive 15 years with a mandatory 85 percent commitment time. However, our role is not to substitute our judgment for the trial court but to determine whether the trial court acted in an arbitrary, capricious, or patently absurd manner that results in the manifest miscarriage of justice. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433-1434.) In the absence of such a showing we must presume that the trial court acted to achieve legitimate sentencing objectives and we may not set aside the trial court's discretionary determination to impose a particular sentence. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978, disapproved on other grounds in *People v. Williams* (2005) 35 Cal.4th 817, 832.)

The record shows that the trial court carefully considered defendant's arguments and reviewed his probation report and history, including a psychological assessment. The trial court noted that defendant had a "tough childhood," but that he had been given leniency by the courts in two past domestic violence cases and had avoided a second strike sentence in the adult robbery conviction. The trial court found that defendant was not outside the spirit of the Three Strikes law. We conclude that the trial court's refusal to strike the prior conviction was not arbitrary and capricious and the trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST